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Supreme Court

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United States

October Term, 1977

NO. 77-1739

PAUL MARK RYAN, ARTHUR T. McMANMON, JAMES M. CONNOLLY, Trustees of the EDWARD C. DONNELLY, JR. REVOCABLE TRUST,

Petitioners,

vs.

MARY ELIZABETH DONNELLY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION
(With Appendix)

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QUESTION PRESENTED

Respondent disagrees with petitioners' statement that the Circuit Court of Dade County, Florida held that Florida courts have personal jurisdiction over non-resident petitioners on the sole ground that they are doing business in the state. In actuality, the Circuit Court's order states that the Florida courts have personal jurisdiction over the non-resident petitioners on the grounds that they were engaged in a business or business venture in the state, both personally and through agents, *and* that the respondent's cause of action arose out of petitioners' business activities in the forum state. Thus, petitioners' "question presented" has already been resolved by the state trial court and does not present a substantial federal question warranting review by this Court.

STATEMENT OF THE CASE

Respondent's complaint in the Circuit Court of Dade County, Florida sought recovery of property in which she claims an ownership right. The property in question consists of all of the issued and outstanding shares of beneficial interest (stock) in John Donnelly & Sons, a Massachusetts business trust (corporation) doing business in Florida. Respondent alleged, *inter alia*, that the stock was the personal property of her late husband, Edward C. Donnelly, Jr., at the time of his death, and that the trust instrument under which petitioners claimed ownership of the stock was illusory, testamentary and therefore void.

Respondent's ownership right originated in and was perfected through her timely and proper election of dower. Her *cause of action*, however, arose out of her demand and petitioners' refusal to honor her ownership right, and petitioners' subsequent and continuing retention, control, and exercise of dominion over the stock through business activities conducted in Florida. Moreover, respondent's complaint also set forth a cause of action arising out of petitioner's failure, personally and through their agents, the executors of the estate of Edward C. Donnelly, Jr., to perform certain duties owing to respondent.

Petitioners were served by substituted service of process on the secretary of state of Florida and also by service of process on their agents in Florida pursuant to Sections 48.071, 48.161 and 48.181, Florida Statutes (1975), on the ground that petitioners, personally and through agents, were engaged in a business or business venture in the state of Florida out of which respondent's cause of action arose. (Petitioners' Appendix C, paragraph 3).

Petitioners moved to dismiss the complaint and quash service of process alleging, among other things, lack of jurisdiction over their persons. (Petitioners' Appendix D(1)).

The trial court denied petitioners' motion and found that petitioners were operating, conducting, engaging in, or carrying on a business or business venture in Florida, both personally and through agents, and that respondent's cause of action arose out of a transaction or operation connected with or incidental to petitioners' business activities in the state. (Petitioners' Appendix C, paragraphs 3, 13, 14). The trial court made specific factual determinations as to the acts which constituted the doing of business in Florida, and the manner in which respondent's cause of action arose out of those activities. (Petitioners' Appendix C, paragraphs 4 through 14).

Petitioners appealed to the Third District Court of Appeal of Florida challenging the sufficiency of respondent's showing that her cause of action arose out of petitioners' business activities in the state. Specifically, petitioners argued that the activities cited by the trial court occurred after respondent's cause of action arose. (Petitioners' Appendix D(3)). Petitioners based this theory on their characterization of the nature of respondent's cause of action and the time at which they claim it arose under Florida law. Their interpretation was vigorously contested by respondent. The Third District Court of Appeal affirmed the decision of the trial court without rendering a written opinion. (Petitioners' Appendix A(1), (2)).

Petitioners then sought a writ of certiorari from the Supreme Court of Florida on the ground that the decision

of the Third District Court of Appeal conflicted with other decisions of the Florida Supreme Court and Florida's First District Court of Appeal. The Florida Supreme Court denied the petition. (Petitioners' Appendix B(1), (2)).

ARGUMENT

The petition for writ of certiorari should be denied on the grounds that: (1) there is no substantial federal question involved in this case, (2) the state appellate court resolved the case on adequate, independent non-federal grounds, (3) the decision below is not in conflict with the due process principles enunciated by this Court in *Hanson v. Denckla*, 357 U.S. 235 (1958) and *Shaffer v. Heitner*, 433 U.S. 186 (1977).

Petitioners are asking this Court to overturn a state trial court's findings of fact and consequent application of the particular facts to a state long-arm statute.[1] The trial court in its order denying petitioners' motion to dismiss made a *factual determination* that the petitioners were doing business in Florida and that respondent's cause of action arose out of the business being done. *See: International City Bank & Trust Company v. Forest Shores, Inc.*, 340 So.2d 530 (Fla. 1st DCA 1976). Florida law dictates that each case involving the application of its long-arm statute must be resolved individually on the basis of the facts revealed by its particular record. *Wm. E. Strasser Construction Corporation v. Linn*, 97 So.2d 458 (Fla. 1957); *Babson Bros. Co. v. Allison*, 298 So.2d 450 (Fla. 1st DCA 1974); *McCarthy v. Little River Bank and Trust Company*, 224 So.2d 338 (Fla. 3d DCA 1969). This Court has indicated that it does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The application of local laws and the facts on which such application is founded are questions for the state court. *Scripto v. Carson*, 362 U.S. 207 (1960).

[1]Petitioners did not at any time challenge the constitutionality of the statute involved herein. The Supreme Court of Florida had previously determined that it is constitutional. *State v. Register*, 67 So.2d 619 (Fla. 1953).

Furthermore, petitioners failed to raise a substantial federal question before the Third District Court of Appeal of Florida. Petitioners framed and limited their jurisdictional argument to maintaining that respondent "has not shown facts which, even if accepted as true, would legally satisfy the requirements of the long-arm statutes . . .". (Respondent's Appendix A). Thus, petitioners raised only a non-federal issue, that is, whether Florida's long-arm statute authorized the assertion of jurisdiction over petitioners on the particular facts presented. They did not raise any federal question as to whether the exercise of such jurisdiction, if found to be authorized, is consistent with due process of law.

The specific points of law disputed by the parties before the Third District Court of Appeal, namely the nature of respondent's cause of action and the time at which it arose, are questions of state law. *See: Garner v. Pearson*, 374 F. Supp. 580 (M.D.Fla. 1973); *Key Pharmaceuticals, Inc. v. Robinson*, 334 So.2d 137 (Fla. 3d DCA 1976). Respondent successfully demonstrated to the Third District Court of Appeal that although her claim of ownership of the property in question originally derived from her dower rights, her present cause of action is not a dower claim.

Under Florida law, the term "cause of action" consists not only of the "genesis" of a right, but also its breach or violation. *Luckie v. McCall Mfg. Co.*, 153 So.2d 311, 314 (Fla. 1st DCA 1963) *cert. denied* 157 So.2d 817 (Fla. 1963). Respondent's cause of action arose out of her demand and petitioners' refusal to honor her ownership right in the property in question, and out of petitioners' subsequent and continuing retention, control, and exercise of dominion over this property through business activities

conducted in Florida. These activities all clearly occurred after the death of Edward C. Donnelly, Jr. and while petitioners were doing business in Florida through their control of John Donnelly & Sons.

Respondent also complained of petitioners' failure, personally and through their agents (the executors of the estate of Edward C. Donnelly, Jr.) to perform certain duties owing to respondent. Under Florida law, respondent's timely election of dower made her a creditor of her late husband's estate. *See: Wax v. Wilson,* 101 So.2d 54 (Fla. 3d DCA 1958). Respondent demonstrated to the Third District Court of Appeal that petitioners, through their agents, had the duty to pay the debts of the Donnelly estate. In furtherance of this duty, petitioners and their agents investigated, certified and paid numerous debts of the estate. Respondent demanded that petitioners pay the estate's debt to her, was refused payment, and thereafter demanded proper proof of petitioners' alleged ownership rights to the property in question. Petitioners, personally and through their agents, refused to present proper independent verification of their claim and simply relied upon the trust document itself. This demand and refusal clearly occurred after the death of Edward C. Donnelly, Jr. and during the time petitioners were actively engaged in business in Florida through their agents in the investigation, certification and payment of the debts of the estate.

Thus, on the basis of state law, the trial court determined not only that petitioners were engaged in a business or business venture in Florida, but that respondent's cause of action arose out of their business or business venture. The Third District Court of Appeal affirmed the trial court's decision without finding the need to render a written opinion and the Supreme Court of Florida, by declining to accept jurisdiction, indicated that the decision was not in conflict with other expressions of Florida law.

It is significant that the Third District Court of Appeal did not render a written opinion. It is well-established that before this Court will review a decision of a state court it must affirmatively appear from the record that a federal question was presented to the highest court of the state having jurisdiction to review the cause, and that a decision of the federal question was necessary to its determination. Where the state court does not render a written opinion and it appears that the judgment might have rested on non-federal grounds, this Court will not take jurisdiction to review the judgment. *Durley v. Mayo,* 351 U.S. 277 (1956). Under Florida law, an appellate court need not agree with the trial court's reasoning, but rather is bound to affirm on the basis of any theory revealed by the record. *New Magnolia Baptist Church, Inc. of Branford v. Ellerker,* 353 So.2d 204 (Fla. 1st DCA 1977); *Board of County Commissioners of Metropolitan Dade County v. Lowas,* 348 So.2d 13 (Fla. 3d DCA 1977). Clearly, petitioners cannot demonstrate that the Third District Court of Appeal's *per curiam* affirmance did not rest on adequate independent non-federal grounds.[2]

[2]Petitioners themselves indicated in their brief before the Third District Court of Appeal that the appeal could be completely resolved on the basis of Florida common law, as follows:

> "This appeal can be resolved simply and correctly by applying the commonsense rule enunciated by the Florida courts that a nonresident cannot be subject to service of process under Florida's 'doing business' long-arm statutes (Sections 48.181 and 48.071) if the plaintiff's cause of action arose *before* the nonresident was operating, conducting, engaging in, or carrying on a business or business venture in the state or before it had an office or agency in the state. [Citations omitted.]" (Petitioners' Appendix D(3) paragraph 1).

The decision below does not conflict with *Hanson v. Denckla*, 357 U.S. 235 (1958) or *Shaffer v. Heitner*, 433 U.S. 186 (1977). Petitioners have cited as their grounds for federal jurisdiction that *Hanson* and *Shaffer* establish that an element in determining whether due process has been accorded is whether the plaintiff's cause of action arose out of the non-resident defendant's activities in the forum state. The trial court applied this very element and made specific findings of fact as to the manner in which respondent's cause of action arose out of petitioners' activities in the forum state.

Petitioners also contend that this Court has not determined whether due process *requires* a plaintiff's cause of action to arise from the defendants' activities in the forum state. There is clearly no need for this Court to make the determination requested by petitioners because the state trial court expressly found such a requirement under Florida law and applied it to the facts of this case. Thus, this Court would merely be rendering an advisory opinion by addressing the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondent in Opposition (With Appendix) was served by mail on BLACKWELL WALKER GRAY POWERS FLICK & HOEHL, Attorneys for Petitioners, 2400 First Federal Building, One Southeast Third Avenue, Miami, Florida 33131, this third day of July 1978.

LAURENCE A. SCHROEDER

APPENDIX A

Portion of Brief of Petitioners in Third District
Court of Appeal of Florida

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

Case No. 77-431

PAUL MARK RYAN, ARTHUR T. McMANMON, JAMES M. CONNOLLY, Trustees of the EDWARD C. DONNELLY, JR, REVOCABLE TRUST dated October 8, 1968,

Appellants,

vs.

MARY ELIZABETH DONNELLY,

Appellee.

* * *

It is on these facts, and on the argument of this brief that the plaintiff has not shown facts which, even if accepted as true, would legally satisfy the requirements of the long-arm statutes, that the defendants rest their assertion that the trial court has not obtained jurisdiction over their persons.

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS' MOTION TO DISMISS AND MOTION TO QUASH PURPORTED SERVICE OF PROCESS ON THE GROUND OF LACK OF JURISDICTION OVER THE PERSONS OF THE DEFENDANTS WHERE THE COURT RELIES ON ALLEGATIONS OF DEFENDANTS' ACTIVITIES IN THE STATE OCCURRING AFTER THE PLAINTIFF'S CAUSE OF ACTION AROSE AND WHERE THE PLAINTIFF HAS NOT SHOWN THAT THE DEFENDANTS WERE DOING BUSINESS IN FLORIDA OR THAT THE DEFENDANTS' ALLEGED ACTIVITIES IN THE STATE GAVE RISE TO THE PLAINTIFF'S CAUSE OF ACTION.

* * *